

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL MISCELLANEOUS APPLICATION NO. 243 OF 2004**

(1) Zuari Cement Limited, a
Company incorporated
under the Companies Act,
1956 (Act 1 of 1956),
having its registered office
at Jai Kissan Bhavan,
Zuarinagar-Goa, represented
herein by its duly constituted
Attorney, Mr.Nishanth Malhotra.

(2) Mr. M. Kanapille,
Managing Director,
Zuari Cement Limited,
Jai Kissan Bhavan,
Zuarinagar-Goa.

(3) Mr. Krishna Srivastava,
Marketing Director,
Zuari Cement Limited,
Jai Kissan Bhavan,
Zuarinagar-Goa.

... Applicants

versus

M/s Prabhat Agencies, a
Proprietary Concern of
Mr. Rajesh V. S. Amonkar,
having address at 1120/1,
Housing Board Colony,
Alto Betim, Porvorim,
Bardez-Goa.

... Respondent

Mr. M. S. Sonak and Mr. D. Pangam, Advocates for the Applicants.

Mr. Rohit Bras D'Sa, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE : 11TH FEBRUARY, 2005.

ORAL ORDER

The applicants/accused in C.C. No.191/2002/C have invoked the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973(Code, for short) to quash and set aside the Order dated 28-7-2004 of the learned J.M.F.C., Panaji, issuing process against them under Sections 403 and 420 I.P.C.

2. There is no dispute that the complainant in the said case and the accused/Company had business dealings with the former purchasing cement from the latter, and as per the complainant he making regular payments for the said purchases. There is also no dispute that there was a dispute between the complainant and the said Company as a result of which the complainant stopped purchasing cement from the said Company.

3. According to the complainant he had a cash credit account with Goa Urban Co-operative Bank Limited, Mala, Panaji and he had a cheque book facility to operate the said account and as he misplaced/lost the said cheque book issued to him by the said Bank he wrote a letter dated 29-1-2002 to the said Bank informing them about the loss of the said cheque book with a request not to allow any person to encash any cheques from the said cheque book, if presented. The complainant claimed that on 31-8-2002 he came to know that six cheques of Rs.50,000/- each totalling to Rs.3,00,000/- were presented at the said Bank and as such by letter of the same date he informed the said Bank that the said cheques were from the said cheque book which was lost by him earlier and regarding which he had informed them by letter dated 29-1-2002. On the said day, the complainant also lodged a complaint at Porvorim Police Station informing them that the accused/Company was trying to cheat him by resorting to fraudulent legal means to extract money from him to encash the cheques.

4. There is also no dispute that the complainant received a notice dated 17-9-2002 sent on behalf of the said Company demanding a sum of Rs.3.25 lakhs from the complainant on account of seven cheques issued by the complainant in their favour and further threatening the complainant that in case the said amount was not paid proceedings under Section 138 of

the Negotiable Instrument Act, 1881 (Act, for short) would be filed against the complainant.

5. The complainant replied to the said letter through his Advocate by reply dated 3-10-2002 and in the said reply the complainant denied that the Company had supplied cement on credit. On behalf of the complainant, it was stated that when the cement was supplied the payment was promptly made but at the time of commencement of dealership, the Company by way of security, had insisted upon furnishing blank cheques duly signed by the complainant with a clear and specific understanding that the said cheques would be presented in case there remained outstanding dues payable to the Company and the said cheques would be deposited only after informing the complainant about their intention of depositing the said cheques and obtaining the approval of the complainant for the same. The complainant denied in the said notice that a sum of Rs.3.25 lakhs was due and payable by him towards the said seven cheques. The averment that the complainant had lost/misplaced the cheque book containing six cheques of Goa Urban Co-operative Bank Limited was repeated in the said notice. Another notice dated 19-9-2002 was sent to the complainant demanding

a further sum of Rs.1.5 lakhs and in case it was not paid the Company had stated that action under Section 138 of the Act would be taken against him. The complainant replied to the said notice by his reply dated 3-10-2002. In this reply also on behalf of the complainant it was reiterated that at the time of commencement of dealership the Company by way of security had insisted upon furnishing blank cheques duly signed by the complainant with clear and specific understanding that the cheque would be presented in case there remained any outstanding dues payable to the said Company. The said averment regarding the cheque book being lost was repeated. It was further stated on behalf of the complainant that the question of payment of Rs.3.25 lakhs did not arise at all.

6. The Company filed the complaint on 31-10-2002 before the J.M.F.C., Vasco-da-Gama under Section 138 of the Act alleging failure on the part of the complainant to pay a sum of Rs.4.75 lakhs due on the said cheques as against Rs.4.89 lakhs otherwise payable by the said complainant. The complainant filed a complaint before the learned J.M.F.C., Panaji, dated 2-11-2002 alleging that the complainant did not owe any amount to the said Company in respect of any debt or liability and that the complainant had not issued the said six cheques of Rs.50,000/- each

amounting to Rs.3,00,000/- and that the attempt made by the said Company to encash the said cheques was illegal and constituted offences punishable under Sections 379, 403, 407, 420, 465 and 468 of I.P.C. The complainant also alleged that the attempt to encash the said cheques was made by the Company with the Goa Urban Co-operative Bank Limited, Panaji, and, therefore, the offences were committed by the accused/Company within the jurisdiction of the learned J.M.F.C.

7. After recording the statement on oath of the complainant, the learned J.M.F.C. was pleased to issue process against the accused under Sections 403 and 420 I.P.C. The learned J.M.F.C. observed that no case was made out by the complainant under Sections 379, 407, 465 and 468 I.P.C. The first controversy raised on behalf of both the parties is regarding the exercise of jurisdiction by this Court under Section 482 Cr.P.C. regarding which there can be no two opinions that it is exceptional and could be exercised in special or exceptional cases only.

8. Mr. M. S. Sonak, the learned Counsel on behalf of the Applicants as well as Mr. Rohit Bras D'Sa, the learned Counsel on behalf of the Respondent have referred to the case of **Zandu Pharmaceutical Works Ltd. and others v. Mohd. Sharaful Haque and another**((2005) 1 SCC 122). In this case, the Hon'ble Supreme Court has stated that the

exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule and that Section does not confer any new powers on the High Court but only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely those which are mentioned in Section 482 of the Code. The Supreme Court has further stated that inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. The Court referred to the case of **State of Haryana v. Bajan Lal** (AIR 1992 SC 604) and stated that the scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of any court or otherwise to secure the ends of justice were set out in some detail. Indeed, the Supreme Court in the aforesaid case indicated certain illustrative categories where this Court could exercise the inherent power under Section 482 of the Code. The illustrated cases, relevant as far as this case is concerned could be stated thus:-

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(3)

(4) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can over reach a just conclusion that there is sufficient ground for proceeding against the accused.

(5)

(6) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

9. In the case of **Madhavrao Jiwajirao Scindia and others v. Sambhajirao Chandrojirao Angre and others** ((1988) 1 SCC 692) the Supreme Court indicated as to when powers under Section 482 of the Code

could be used to quash proceedings at preliminary stage and stated that the test to be applied at this stage is as to whether the uncontroverted allegations as made prima facie establish the offence and it is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore,, no useful purpose is likely to be served by allowing a criminal prosecution to continue.

10. Again, in the case of **Alphic Finance Ltd. v. P. Sadasivan and another** ((2001) 3 SCC 513) the Supreme Court indicated the contours of the power under Section 482 of the Code and relying on yet another decision in the case of **Nagawwa v. Veeranna Shivalingappa Konjalgi** (((1976) 3 SCC 736) stated that the Magistrate while issuing process against the accused should satisfy himself as to whether the allegations in the complaint, if proved, would ultimately end in the conviction of the accused and that process issued against the accused could be quashed under the following circumstances:-

1. Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused.

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused.

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

11. Reverting to the facts of this case, I must observe that it does not require a very discerning eye to find out that the complaint was mischievous and was made to prevent the impending action which was liable to be launched against the complainant pursuant to the notice issued to the complainant under Section 138 of the said Act. First, I will take the case of the petitioners nos.2 and 3 who are stated to be accused nos.2 and 3 in the

said complaint. The cause title of the complaint-case No.191/2002/C reads as follows:-

"PRIVATE CRIMINAL CASE NO.191/2002/C

M/s PRABHAT AGENCIES,
A proprietary concern owned
by Mr. RAJESH V. S. AMONKAR,
having its address at 1120/1
Housing Board Colony,
Alto Betim, Porvorim,
Bardez, Goa.

... COMPLAINT

V/s

ZUARI CEMENT LIMITED,
A company incorporated
under the Companies Act,
1956, having its Registered
Office at JAI KISSAN BHAVAN
Zuarinagar, Goa.

... ACCUSED"

(through its directors)

1). Mr. Kanapille-Managing Director

2). Mr. Krishna Srivastava-Marketing Director

12. It is evident from the said cause title that the complaint has been filed against Zuari Cement Limited through its Directors, namely (1) Mr. Kanapille-Managing Director and (2) Mr. Krishna Srivastava-Marketing Director.

13. Mr. Bras D'Sa, the learned Counsel on behalf of the complainant submits that there are three accused in the said complaint case. When his attention was drawn as to why in case there were three accused, each of them was not shown by a separate number, Mr. D'Sa submits that that was not done and refers to Section 63 of the Code which deals with service of summons on Corporate Bodies and Societies. I do not think it is at all necessary to refer in detail to Section 63 of the Code which deals only with the manner of service on Corporate Bodies and Societies. I do not think that English language is so poor in numerals that each of the accused could not carry one numeral each. It was further averred in para 2 of the complaint that the accused is a company. There is absolutely no reference in the entire complaint to anything having been done by the said Kanapille, the Managing Director or Krishna Srivastava, the Marketing Director. In the absence of any allegations against them the learned J.M.F.C ought not to have issued process against them at all. The cause title clearly showed that there was only one accused in the case, namely Zuari Cement Limited and no other accused. This becomes more clear from the complaint dated 31-1-2004 filed by the complainant to the Police Inspector which clearly and unequivocally mentions that it is a complaint only against Zuari Cement Limited. The learned J.M.F.C. appears to have not at all examined the allegations in the complaint or for that matter the statement, on oath, recorded of the complainant and without perusing the

same carefully issued process against the said Managing Director and Marketing Director without there having been any allegations whatsoever against them, they having committed no offence whatsoever. If at all the learned J.M.F.C. meant by his Order dated 28-7-2004 that he issued process against the said Managing Director and Marketing Director of the said Company, then the same requires to be quashed and set aside.

14. Reverting to the case of the Company, Mr. Sonak has placed reliance on the case of **Assistant Commissioner v. Velliappa Textiles Ltd. and another** ((2003) 11 SCC 405) and has submitted that Section 420 I.P.C. requires that an accused must be punished compulsorily with imprisonment which cannot be done in the case of a Company and, therefore, no prosecution against the Company under Section 420 I.P.C. would be maintainable. Indeed, by a majority view, the Hon'ble Supreme Court in the aforesaid case has stated that since a Company is incapable of imprisonment, such prosecution against the Company would not be maintainable. Mr. Sonak has also brought to my notice that the said Judgment of the Hon'ble Supreme Court in the case of **Assistant Commissioner v. Velliappa Textiles Ltd. and another**(supra) has been referred to a Constitution Bench by another Bench of three Judges in the case of **ANZ Grindlays Bank Ltd. and others v. Directorate of Enforcement and others** ((2004) 6 SCC 531). At the same time, Mr.

Sonak submits that till the matter is decided by the Constitution Bench of the Supreme Court, the law laid down in the case of **Assistant Commissioner v. Velliappa Textiles Ltd. and another** (supra) ought to be followed.

15. I do not propose to enter into this controversy which is not required to be entered into because in case Section 420 I.P.C. is excluded, Section 403 will be required to be dealt with.

16. The bare averments or the allegations in the complaint, apart from the allegation that the complainant lost the said cheque book and that he was shocked on 31-8-2002 that the Company had presented the said six cheques for payment to the Goa Urban Co-operative Bank Limited are as follows:

"The complainant does not owe any amount to the accused/Company in respect of any debt or liability" and "the attempts to encash the cheques was made by the accused/Company with Goa Urban Co-operative Bank Limited".

"Attempts made by the accused/Company to encash the said cheques is patently illegal and constitutes offences punishable under Sections 379, 403, 407, 420, 465 and 468 I.P.C."

A solitary statement on oath made by the complainant apart from what was stated in the complaint is that "the accused have committed offences by cheating him and presenting the cheques by dishonest intention to withdraw money from his Bank account. The complainant also stated that he used to make payment to the accused/Company whenever he used to purchase cement from them and he was not owing any amount to the accused/Company".

17. As far as the offence under Section 420 I.P.C. is concerned, Mr. D'Sa fairly submits that there are no allegations constituting the offence under Section 420 I.P.C. made in the complaint or in the statement on oath of the complainant. Mr. D'Sa submits that these are blanks which could be filled in at the stage before framing of charge against the accused and in this context, Mr. D'Sa has placed reliance on the case of **Messrs. Gulfam Exporters and another v. Sayed Hamid and others** (2000(2) Bom.C.R. 619) wherein it is stated as follows:-

"So far as the first contention of Mr. Desai is concerned it cannot be said that the complaint does not make out a prima facie case under the Copyright Act or Trade and Merchandise Marks Act. The complaint does speak about the knowledge on the part of the petitioners about the use of the trade mark by the complainant. The

complaint does speak about the knowledge of the petitioners in respect of the Copyright of the complainant. If the particulars are not given in the complaint, as to how the petitioners could be said to have knowledge of the use of copyright by the complainant the same can be proved at the time of trial. There are also averments in the complaint that the complainant had been using the trade mark from the year 1979 and had made application for the registration of the trade mark in the year 1985. The particulars in respect thereof could be furnished at the time of trial by leading evidence in that behalf'.

18. In my view, the aforesaid observations cannot at all be applied to the facts of this case. The basic ingredient of Section 420 I.P.C. is that there should be inducement by the accused to the complainant at the initial stage and if there is no inducement, there cannot be an offence of cheating. There is no averment in the complaint that the said Company had made any representation which was false, to the knowledge of the accused/Company and the accused/Company had dishonest intention from the out-set. Likewise, there is no averment that the complainant was induced to deliver any property. All we find from the said complaint and the statement on oath of the complainant, is, first, that the complainant lost the cheque book and second that the accused presented the said cheques for payment with the Goa Urban Co-operative Bank Limited at Panaji.

19. The Supreme Court in the case of **Alpic Finance Ltd. v. P. Sadasivan and another** (supra) has stated, with reference to Section 420 I.P.C., that to deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence.

20. Again, the Supreme Court in the case of **Hridaya Ranjan Prasad Verma and others v. State of Bihar and another** ((2000) 4 SCC 168) referring to Section 415 I.P.C. has stated that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. The Supreme Court further stated that it is the intention which is the gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently, such a culpable intention right at the beginning, that is, when he made the promise cannot

be presumed. As already stated, the complaint as well as the statement on oath of the complaint did not at all disclose the basic ingredients of cheating, under Section 420 I.P.C., or in what manner the complainant was induced by the Company to part away with the said cheques and being so it is no consolation that the complainant will bring such ingredients on record prior to the stage of framing of the charge of the accused. In the absence of necessary ingredients in the complaint no process under Section 420 I.P.C. could have been issued against the said Company.

21. Reverting to Section 403 I.P.C. which deals with dishonest misappropriation of property, Mr. D'Sa has referred to illustration (c) below explanation 2 of Section 403 which reads as follows:-

"(c) - A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section".

22. Section 403 I.P.C. deals with dishonest misappropriation of property and states that whoever dishonestly misappropriates or converts

to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. It is nobody's case that the Company has misappropriated any amount belonging to the complainant. In fact, the cheques were presented by the Company to the Corporation Bank at Bangalore on 4-9-2002 as stated on behalf of the Company on the letter sent on its behalf dated 17-9-2002. If at all the Company had presented cheques which were not issued to the Company, it was at the most a case of attempt to commit an offence under Section 403 I.P.C. and that too committed, again if at all at Bangalore at the place where the said cheques were presented for encashment and not at Panaji where the Corporation Bank, Bangalore sent them for collection. This is not a case under the Negotiable Instrument Act, 1881 but a case of an alleged attempt to misappropriate the amount due on the said cheques and which attempt admittedly took place at Bangalore and, therefore, it is obvious that the learned J.M.F.C., Panaji, had no jurisdiction to issue process against the accused. That apart, the said alleged attempt had to be seen in the light of other facts stated by the complainant and the documents submitted by the complainant along with the complaint. As already stated, the complainant had business dealings with the accused/Company and the complainant was purchasing cement from the Company. It is submitted that the complainant

had a credit account with the said Company and there was a dispute about the same. It was clearly stated in the reply of the complainant dated 3-10-2002 that at the time of commencement of dealership the Company by way of security had insisted upon furnishing blank cheques duly signed by the complainant with a clear and specific understanding that in case there remained any outstanding dues payable by the complainant and that the said cheques would be deposited only after informing the complainant. The complainant trickily did not mention the numbers of the said blank cheques which the complainant is alleged to have given to the said Company. Whether the said cheques given by the complainant to the Company were given either by way of security or in discharge of the complainant's debt or liability will be a matter which will be looked into by the learned J.M.F.C, Vasco-da-Gama in the complaint filed by the said Company against the accused(complainant). The complainant simply threw facts in the air by stating that he had lost the cheque book but did not connect the same as to how the Company got the said cheques. The averments in the complaint were so incredible in the light of business transactions which the complainant had with the accused/Company and the notice sent by the Company threatening action under Section 138 of the Act that the learned J.M.F.C. ought to have been slow to issue process against the accused when the said averments and the statements made by the complainant on oath

did not disclose any of the offences alleged against the accused. It is evident that the complaint was filed by the complainant with a mala fide and/or with motives in order to avoid the action which would follow the notice sent by the Company dated 17-9-2002. The learned Magistrate ought not to have issued process against the Company in the background of facts stated by the complainant in his reply to the said notice dated 3-10-2002. It is incredible that a Company like in the present case would present cheques for payment which were lost and found and which were not issued to the Company in the absence of any allegations made as regards the said cheques against any of the Officers of the said Company. It is incredible that the cheques allegedly lost by the complainant would be found of all persons by a Company with whom the complainant had business dealings and to whom he had even issued blank cheques. This case is squarely covered by illustrations (4) and (6) as approved in **Zandu Pharmaceutical Works Ltd. and others v. Mohd. Sharaful Haque and another**(supra). In my view, this is a fit case to quash the process issued against the accused as it has been issued with oblique motives and without the basic ingredients of the offences having been made out against the accused, and, therefore, being abuse of process of Court.

23. In view of the above, I allow the petition and quash and set aside the Order dated 28-7-2004 of the learned J.M.F.C, Panaji, in C.C.

No.191/2002/C with costs of Rs.5000/- to be paid by the complainant to the accused/Company.

N. A. BRITTO, J.

RD.